



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 5344  
Santorum 2000 and Judith M. McVerry, )  
as Treasurer )  
 )  
Brabender Cox Mihalke Political, Inc. )

**Statement of Reasons**  
Vice Chair Ellen L. Weintraub

On October 15, 2003, the Commission voted to enter into conciliation with Brabender Cox Mihalke Political, Inc. ("Brabender") and approved a proposed conciliation agreement. On December 4, 2003, the Commission voted to approve a conciliation agreement with Brabender, to take no further action as to Santorum 2000 and its treasurer, and to close the file. I dissented on both votes because I believe additional discovery was warranted.

Brabender is a long-time media consultant to Senator Santorum, the third ranking Republican in the Senate. Their professional relationship dates back to 1990, and includes billings of more than \$6.5 million between 1995 and the 2000 General Election.<sup>1</sup> Santorum 2000 agreed to a budget plan in the beginning of the campaign that provided approximately \$6 million for the creation and broadcast of television advertisements supporting Santorum's re-election.<sup>2</sup> According to Respondents, in the weeks preceding the 2000 election, Mark Rogers, on behalf of Santorum 2000, told John Brabender to cancel \$197,000 in previously planned media buys.<sup>3</sup> Brabender seems to have forgotten to implement this instruction, so the buys were made in accordance with the original plan.<sup>4</sup> Although the campaign thus received the benefit of the advertising, the committee objected to the bill. When reminded of the earlier conversation, Mr. Brabender says he withdrew the invoice, his firm having already paid for the ads. In an affidavit, Mr.

<sup>1</sup> See Letter from Barbara W. Bonfiglio, Counsel to Judith M. McVerry, dated February 10, 2003, and Conciliation Agreement at 2.

<sup>2</sup> Conciliation Agreement at 2.

<sup>3</sup> "[Mark Rogers] indicated to me at that time that we needed to reduce our media budget by approximately \$200,000. He suggested that we cut back our media buys in Harrisburg and Philadelphia." Affidavit of John Brabender.

<sup>4</sup> "I meant to speak to our media department about making the requested budget reduction." Affidavit of John Brabender.

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Brabender explained: "Considering the importance of this client to our firm . . . since 1990 we have billed them in excess of \$10,000,000, we felt the best decision we could make for continuing a good business relationship with the campaign was to accept our responsibility for the error."<sup>5</sup> In the conciliation agreement, Brabender admits to having made an illegal corporate contribution of \$197,000 to Santorum 2000 and agrees to pay a modest \$30,000 civil penalty.<sup>6</sup> After its initial reason-to-believe finding against Santorum 2000, the Commission accepted Respondents' version of the facts and took no further action against the campaign committee.

Respondents stated that in accordance with their longstanding practice, they operated under an oral "gentlemen's agreement," supplemented by frequent discussions.<sup>7</sup> Thus, there are no contemporaneous documents reflecting the conversations described above between Brabender and Santorum 2000. In support of their position, Respondents submitted various responses from their lawyers and a one-page affidavit from John Brabender. As to the failure to communicate an instruction worth almost \$200,000 to his firm, Mr. Brabender offers this somewhat vague and passive explanation: "Unfortunately, in the course of working on a large number of campaigns at that time, an oversight was made and I never communicated to our media department."<sup>8</sup> Santorum 2000 submitted no sworn testimony.<sup>9</sup>

I have no way of knowing what actually transpired between Mr. Brabender and his important client. It may well be that in the heat of a busy campaign season, Mr. Brabender got busy and simply forgot an earlier conversation. However, in my experience as a practicing attorney, I have found that it is very difficult to assess the credibility of a piece of paper. While there is nothing in the record that contradicts Mr. Brabender's affidavit, there is also nothing that supports it. In a case that depends entirely on two persons' unsubstantiated recollection of a conversation and their subsequent actions, it seems to me that it would have been worthwhile to take their depositions. Had we directed the Office of General Counsel to do so, and had the counsel then come back to the Commission with an assessment of the credibility of the testimony, I might have been willing to vote with my colleagues to accept the very same resolution of this matter. I objected because I thought closing the MUR without taking those key depositions was premature.



Ellen L. Weintraub

Vice Chair

1/21/04  
Date

<sup>5</sup> Counsel for Ms. McVerry similarly argues the amount at issue is a relatively modest sum: "An unauthorized media buy of \$197,000 amounts to .04% of the total income paid by the Committee to Brabender since 1990." Response from Barbara W. Bonfiglio, Counsel to Judith M. McVerry, at 3.

<sup>6</sup> Conciliation Agreement at 4-5.

<sup>7</sup> See Letter from Barbara Bonfiglio, Counsel for Santorum 2006, dated June 29, 2001, and Affidavit of John Brabender.

<sup>8</sup> Affidavit of John Brabender.

<sup>9</sup> Although we have an affidavit from Mr. Brabender, we do not have one from Mr. Rogers.